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In the Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, and STEPHEN GOLDSMITH, in His Official Capacity as Mayor of the City of Indianapolis, Indiana,
Petitioners,

v.

JAMES EDMOND, JOELL PALMER, on Their Own Behalf and on Behalf of a Class of Those Similarly Situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether checkpoints at which law enforcement officers briefly stop vehicular traffic, check motorists' licenses and vehicle registrations, look for signs of impairment, and walk a "narcotics detection" dog around the exterior of each stopped automobile are unlawful under the Fourth Amendment.

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INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public-interest law and policy organization based in Washington, D.C., with supporters nationwide. WLF appears regularly in proceedings before federal and state courts to promote the rule of law, individual rights, free enterprise, and limited government. WLF has appeared before the Court as *amicus curiae* in other Fourth Amendment and particularly drug-related cases. *See, e.g., Chandler v. Miller,* 520 U.S. 305 (1997); *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646 (1995); *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444 (1990); *Treasury Employees v. Von Raab,* 489 U.S. 656 (1989).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared before the Court as *amicus curiae* on several occasions.

WLF submits this brief in support of petitioners and with the consent of the parties. Letters of consent have been filed with the clerk of the Court.[1]

SUMMARY OF ARGUMENT

The City of Indianapolis has determined, in its sovereign wisdom, that a portion of its law-enforcement resources should be devoted to apprehending narcotics traffickers within its jurisdiction. Consequently, the

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel, made a monetary contribution to the preparation and submission of this brief.

city has established highway checkpoints that combine two clearly constitutional practices. It is indisputable that law-enforcement officers may briefly stop vehicular traffic to check motorists' licenses and vehicle registrations and to look for signs of impairment without violating the Fourth Amendment's prohibition on unreasonable seizures. It is also unquestionable that walking a "narcotics detection" dog around the exterior of a stopped automobile does not defy the Fourth Amendment's bar on unreasonable searches. In fact, the use of a dog's sense of smell does not constitute a search at all under the Fourth Amendment.

Nonetheless, the U.S. Court of Appeals for the Seventh Circuit ruled that when these two otherwise lawful activities are combined, they somehow become unconstitutional. In the Seventh Circuit's surprising conclusion, two rights make a wrong. The basis for the Seventh Circuit's opinion is that because the city's primary purpose is law enforcement rather than civil regulation, the checkpoints must be justified by individualized suspicion rather than weighing their benefits to society against their costs to individual privacy. This distinction permitted the Seventh Circuit to sidestep the Court's two most prominent checkpoint cases, *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444 (1990) (sobriety checkpoints), and *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976) (inland checkpoints to detect illegal aliens).

Yet as *Sitz* and *Martinez-Fuerte* make clear, a balancing analysis, not individualized suspicion, is the appropriate standard to assess reasonableness in checkpoint cases. Moreover, the city's checkpoints are virtually indistinguishable from those in *Sitz* and *Martinez-Fuerte,* both of which involved law-enforce-

ment as well as civil regulatory purposes. In addition, the line drawn by the Seventh Circuit between law enforcement and civil regulation is highly ambiguous. Indeed, the Seventh Circuit's distinction puts the judiciary in a position to trample the prerogative of the elected branches on when and how best to use law-enforcement resources. Finally, neither the text nor the history of the Fourth Amendment supports a higher standard of reasonableness for searches and seizures related to law enforcement. The Court should thus find the city's checkpoints constitutional.

ARGUMENT

I. THE REASONABLENESS OF THE CITY'S CHECKPOINTS SHOULD BE ASSESSED BY A BALANCING ANALYSIS AT THE PROGRAM LEVEL, NOT BY A SPECIAL-NEEDS TEST OR AN INQUIRY INTO INDIVIDUALIZED SUSPICION

The Seventh Circuit's decision turned on "whether reasonableness is to be assessed at the level of the entire program or of the individual stop." Pet. App. 3a. It conceded that the city's checkpoints, if evaluated at the program level, "probably are legal, given the high 'hit' rate and the only modestly intrusive character of the stops." *Id.*[2] Yet because it believes the city's checkpoints are "related to general criminal law enforcement" and not "to primarily civil regulatory programs for the protection of health, safety, and the integrity of our borders," the Seventh Circuit

[2] Of 1,161 vehicles stopped, the checkpoints have yielded fifty-five drug-related arrests and forty-nine non-drug-related arrests, an overall arrest rate of 9%. *Id.* at 2a-3a.

determined that reasonableness must be assessed at the level of the individual stop. *Id.* at 4a.

In support of its choice of standard, the Seventh Circuit wrote, "the Supreme Court has insisted that 'to be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing,' save in cases of 'special need' based on 'concerns other than crime detection.'" *Id.* at 5a (citations omitted) (*quoting Chandler v. Miller*, 520 U.S. 305, 313-14 (1997)). Yet in *Chandler v. Miller*, the Court also noted that "[s]earches conducted without grounds for suspicion of particular individuals have been upheld, however, in 'certain limited circumstances.' These circumstances include brief stops for questioning or observation at a fixed Border Patrol checkpoint, or at a sobriety checkpoint, and administrative inspections in 'closely regulated' businesses." 520 U.S. 305, 308 (1997) (citations omitted) (*quoting Treasury Employees v. Von Raab*, 489 U.S. 656, 668 (1989)).

Chandler, which involved drug-testing of candidates for public office, is the progeny of the Court's other drug-testing cases, including *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1997) (drug-testing of high-school athletes), *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (drug-testing of customs agents), and *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (drug-testing of railroad employees). The Court's disclaimer in *Chandler* is important, because it recalls that the drug-testing cases are not to be confused with checkpoint cases.

As the Court explicitly stated in *Michigan Dept. of State Police v. Sitz:*

> Respondents argue that there must be a showing of some special governmental need "beyond the normal need" for criminal law enforcement before a balancing analysis is appropriate, and that petitioners have demonstrated no such need.
>
> But it is perfectly plain from a reading of *Von Raab*, which cited and discussed with approval our earlier decision in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), that *it was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways. Martinez-Fuerte, supra*, which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and *Brown v. Texas, supra*, are the relevant authorities here.

496 U.S. 444, 450 (1990) (emphasis added). Just as the respondents in *Sitz* erroneously suggested that the appropriate standard for the sobriety checkpoints in that case were to be found in *Von Raab*, a drug-testing case, the Seventh Circuit wrongly decided that the proper standard for the checkpoints in this case is to be found in *Chandler* and *Vernonia, Von Raab's* descendants. Because this is a checkpoint case, not a drug-testing case, the special-needs tests outlined in *Chandler, Vernonia, Von Raab*, and *Skinner* do not apply. Rather, the proper test is the balancing analysis used in other checkpoint cases, *Sitz* and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

The balancing analysis was more fully described by the Court in *Brown v. Texas* "'as a balance between the public interest and the individual's right to personal security free from arbitrary interference by

law officers.'" 443 U.S. 47, 50 (citations omitted) *(quoting Pennsylvania v. Mimms,* 434 U.S. 106, 109 (1977)). The Court added:

> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to *arbitrary invasions solely at the unfettered discretion of officers in the field.* To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, *or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.*

443 U.S. 47, 51 (1979) (emphasis added) (citations omitted). In other words, the Court's worry is that individual officers not have arbitrary discretion to pick and choose whom they seize.

This concern was also expressed in *Delaware v. Prouse:* "The essential purpose of the proscriptions of the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents." 440 U.S. 648, 653-54 (1979). Thus, fixed checkpoints that limit the discretion of individual officers to stop vehicles fulfill the demands of reasonableness without individualized suspicion. The Court found the discretionary, roving traffic stops in *Prouse* to be unconstitutional while suggesting that "[q]uestioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663.

The city's checkpoints meet the requirements of *Sitz*, *Brown*, *Prouse*, and *Martinez-Fuerte*. Because they are "meant to intercept a completely random sample of drivers," Pet. App. 6a, they eliminate the prerogative of individual officers to decide which vehicles to seize. Furthermore, "the police endeavor to operate the checkpoints in such a manner that the stop does not exceed five minutes," *id.* at 2a, minimizing the duration of the seizure. The arrest rate at the checkpoints, 9%, *id.*, is much higher than the 1.6% in *Sitz*, 496 U.S. at 448, and the 0.12% in *Martinez-Fuerte*, 428 U.S. at 554.[3] All of these factors support the constitutionality of the city's checkpoints.

II. A DISTINCTION BETWEEN LAW-ENFORCEMENT AND CIVIL REGULATORY PURPOSES IS INSUFFICIENT TO DIFFERENTIATE THE CITY'S CHECKPOINTS FROM THOSE IN *MARTINEZ-FUERTE* AND *SITZ*

The Seventh Circuit attempted to distinguish the city's checkpoints from those in *Michigan State Dept. of Police v. Sitz*, 496 U.S. 444 (1990), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), by drawing a line between law-enforcement and civil regulatory purposes. The cases do not fit into such neat categories, however. The city's checkpoints, like the Border Patrol's in *Martinez-Fuerte*, stop vehicular traffic at fixed locations to detect contraband. The Seventh Circuit claimed that the city's checkpoints have "no regulatory purpose that might be compared to that of the immigration laws, which seek to exclude and

[3] The checkpoint in *Sitz* yielded two alcohol-related arrests out of 126 vehicles stopped. 496 U.S. at 448. In an eight-day period at one of the checkpoints in *Martinez-Fuerte*, illegal aliens were found in 171 of 146,000 vehicles. 428 U.S. at 554.

deport illegal immigrants rather than just to prosecute them for criminal violations of the immigration laws." Pet. App. 10a.

This is a misreading of *Martinez-Fuerte*. The respondents in that case were not illegal aliens, but criminal defendants charged with illegal transportation of aliens seeking to suppress the testimony of those aliens under the exclusionary rule. *Martinez-Fuerte*, 428 U.S. at 547-50. Nor was the Court hesitant to describe *Martinez-Fuerte* as a law-enforcement case. As the Court explicitly declared, "Interdicting the flow of illegal entrants from Mexico poses formidable *law enforcement* problems." *Id.* at 552 (emphasis added).

The Seventh Circuit failed as well to perceive the potentially punitive nature of deportation. Most illegal aliens discovered by the checkpoints in *Martinez-Fuerte* were "simply deported without prosecution." *Id.* at 553 n.9. This does not necessarily imply the absence of a law-enforcement purpose, though. At just one of the checkpoints in 1973 alone there were 17,000 illegal aliens apprehended. *Id.* at 554. The refusal to prosecute might well have reflected a scarcity of judicial and corrective resources as well as a belief that expulsion from the country was in itself a not insubstantial penalty for many illegal aliens despite the non-criminal nature of deportation.

The Seventh Circuit also tried to differentiate the city's checkpoints from those in *Martinez-Fuerte* on the basis of "sovereign powers over foreign relations, foreign commerce, citizenship, and immigration" possessed by the federal government but not by state and local governments. Pet. App. 9a. Such considerations did not enter the Court's inquiry in *Martinez-Fuerte*, however. The ruling in *Martinez-Fuerte* was

based on the rationale that given the lesser expectation of privacy in an automobile and the minimal intrusion imposed by the stops, the public need to cope with illegal immigration justified the infringement on personal privacy:

> As we have noted earlier, one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence. And the reasonableness of the procedures followed in making these checkpoint stops makes the resulting intrusion on the interests of motorists minimal. On the other hand, the purpose of the stops is legitimate and in the public interest, and the need for this enforcement technique is demonstrated by the records in the cases before us. Accordingly, we hold that the stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints.

428 U.S. at 561-62 (citations omitted).

Further undermining the Seventh Circuit's contention that the Court's decision in *Martinez-Fuerte* was based on a distinction between federal as opposed to state and local power is the Court's observation that "[s]tops for questioning, not dissimilar to those involved here, are used widely *at state and local levels* to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters." *Id.* at 561 n.14 (emphasis added). As the Court pointed out, "this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway

use." *Id.* In other words, no special federal power was deemed to be exercised.

And it is strange for the Seventh Circuit to suggest that the Constitution grants the federal government more latitude in searches and seizures than it does state and local governments, given that the Fourth Amendment was put in place with the federal government in mind:

> Nor should we ignore the Fourth Amendment's image of federalism. The reasonableness requirement limited all federal officers, and the warrant clause imposed special restrictions on federal judges and magistrates, but vindication of these restrictions would largely come from state bodies. State statutes and state common law, after all, would typically define and protect ordinary individual's property rights to their "persons, houses, papers, and effects."

AKHIL AMAR REED, THE BILL OF RIGHTS 76 (1998). Given that the Seventh Circuit was unable to cite from *Martinez-Fuerte* any support for its contention of heightened federal powers, this point is easily dismissed.

In fact, it can be maintained that the city's checkpoints are more constitutionally defensible than those in *Martinez-Fuerte*. While the checkpoints in *Martinez-Fuerte* were solely for the purpose of discovering illegal aliens, the city's checkpoints rely in part on state and local governments' traditional and long-standing authority to query motorists about their licenses and registrations. 428 U.S. at 561 n.14. Moreover, given their much higher rate of arrests, the city's checkpoints have arguably brought more

benefits relative to the costs to the mobility and privacy of motorists. Pet. App. 2a-3a.

The Seventh Circuit likewise endeavored to contrast the city's checkpoints to those in *Sitz*, stating that "Indianapolis does not claim to be concerned with protecting highway safety against drivers high on drugs. Its program of drug roadblocks belongs to the genre of general programs of surveillance which invade privacy wholesale in order to discover evidence of crime." Pet. App. 9a. The city's checkpoints presumably visit a no more significant invasion of privacy on motorists than did those in *Sitz*. Additionally, the checkpoints in *Sitz* were established to detect signs of impairment, which are of course evidence of the crime of driving under the influence of alcohol. Intoxicated motorists in *Sitz* were not merely escorted home by officers. Like the offenders apprehended at the city's checkpoints, they were arrested and charged with a crime. 486 U.S. at 447-48.

The checkpoints in *Sitz* were devised not by civil regulators of highway safety, but by law-enforcement officials. The director of the Michigan State Police appointed a committee that included state and local police and state prosecutors, in addition to representatives of the University of Michigan Transportation Research Institute. *Id.* at 447. Further indication of a law-enforcement purpose can be found in crime statistics. According to Mothers Against Drunk Driving (MADD), 1.4 million people nationwide were arrested for driving under the influence (DUI) or driving while intoxicated (DWI) in 1997, "more than all other reported criminal offenses except larceny and theft." Approximately 513,200 offenders were sentenced to probation or incarceration in 1997. *MADD Statistics:*

DUI/DWI Arrests and Convictions (visited May 11, 2000) <http://www.mad.org/stats/stat_dui.shtml>.

Nor does the Court's analysis in *Sitz* support a distinction between law-enforcement and civil regulatory purposes. The Court explicitly adopted the framework from *Martinez-Fuerte* as well as *Brown v. Texas*, 443 U.S. 47 (1979). 496 U.S. at 450. Yet *Brown* was a criminal case involving the seizure of an individual who refused to answer a police officer's questions. 443 U.S. at 48-50. If the Court in *Sitz* had intended to make a distinction between searches and seizures related to law enforcement and those directed toward civil regulation, it presumably would not have relied on a standard from a criminal case in order to do so. It is also noteworthy that the Court in *Brown* cited *Martinez-Fuerte* for support, 443 U.S. at 51, dispelling the notion that *Martinez-Fuerte* is inapplicable in cases where the supposed primary purpose of the search or seizure is law enforcement.

Detecting drunk drivers, like discovering illegal aliens or, for that matter, narcotics traffickers, is a law-enforcement as well as a civil regulatory issue. The fact that there are laws against driving while intoxicated and smuggling illegal aliens, and that such practices are policed by law-enforcement officials and prosecuted in the criminal courts, only serves to further emphasize the arbitrariness of the Seventh Circuit's distinction.

III. THE CITY'S CHECKPOINTS RELATE TO THE CIVIL REGULATORY PURPOSE OF SECURING PUBLIC HEALTH AND SAFETY AS WELL AS TO A LAW-ENFORCEMENT PURPOSE

As *Michigan State Dept. of Police v. Sitz*, 496 U.S. 444 (1990) and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), make clear, law-enforcement and civil regulatory purposes are not mutually exclusive. Indeed, law-enforcement resources are often employed in pursuit of civil regulatory goals. Drunk drivers are arrested and prosecuted not for law enforcement's own sake, but in furtherance of the civil regulatory purpose of securing public health and safety. The same can be said of the apprehension of narcotics traffickers at the city's checkpoints. The use of law enforcement as a means does not preclude the existence of a civil regulatory purpose.

Checkpoints are merely one method employed by the city to combat its drug problem. Anti-drug loitering ordinances, evictions of drug dealers from public housing, citizens' patrols, youth counseling and education, and other community outreach initiatives have also been used. U.S. Office of National Drug Control Policy, Drug Policy Information Clearinghouse, *Profile of Drug Indicators for Indianapolis, Indiana*, at 2-3 (Dec. 1999) <http://www. whitehousedrugpolicy. gov/stateandlocal/states/in/incprofiles.html>. The Seventh Circuit's conclusion that the checkpoints have primarily a law-enforcement purpose implies that catching drug smugglers is an end in itself. Yet it is presumably because narcotics are a threat to public health and safety that they are illegal.

There are abundant examples of the threat narcotics pose to society. Minors are frequent targets of drug dealers. Among juveniles arrested in Indianapolis in 1998, 31% of violent offenders tested positive for drug use, as did 43.6% of property offenders and 55.6% of offenders for other, non-drug-related offenses. Almost one half of all juveniles arrested in Indianapolis in 1998 tested positive for drug use. *Id.* at 5. Drugs are highly associated with violent crimes. In Indianapolis in 1998, 69.4% of males and 55.8% of females arrested for violent offenses tested positive for drug use. *Id.* at 4. This violence poses a threat to the health and safety of the rest of the populace, just as drunk drivers do to other motorists. Drug users are also known to commit property crimes to feed their addiction. In Indianapolis in 1998, 73.3% of males and 68.1% of females arrested for property offenses tested positive for drug use. Overall, 66.8% of males and 67.1% of females arrested in Indianapolis in 1998 for all crimes tested positive for drug use. *Id.* The implication is that drug interdiction increases public health and safety.

Indeed, the 4,476 narcotics-related arrests in Indianapolis in 1998 were more than double the city's 2,106 arrests for driving while intoxicated. *Id.* at 4. The city might reasonably perceive that narcotics pose at least as much concern for public health and safety as drunk driving. While the Court determined in *Sitz* that the use of law-enforcement resources to address one problem was constitutional, the Seventh Circuit decided in this case that use of law-enforcement resources to address the other is not. Referring to the balancing test in *Brown v. Texas,* 443 U.S. 47 (1979), the Court warned in *Sitz:*

> *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. . . . [F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and responsibility for, limited public resources, including a finite number of police officers.

496 U.S. at 453-54. While the Court in *Sitz* referred to a choice between law-enforcement alternatives, the judiciary should similarly be reluctant to substitute its beliefs in place of those of the elected branches of whether law-enforcement rather than other resources are best used in pursuit of a legitimate end.

It is precisely this sort of policy analysis to which courts are least suited. The Seventh Circuit presumed to understand better than Indianapolis itself whether narcotics trafficking was a sufficient threat to public health and safety to merit law enforcement. Particularly on the "very skimpy stipulation of facts" before it, Pet. App. 2a, it is questionable whether the Seventh Circuit was in a position to make such a determination. To grant courts such latitude invites judges to enact their own policy preferences. A judge sympathetic to the plight of illegal aliens might find the rationale for the checkpoints in *Martinez-Fuerte* unjustified. A judge skeptical of drug criminalization might be less willing to believe that the city's checkpoints address public health and safety.

This belies the more humble view of the judiciary, expressed by Alexander Hamilton, that the courts "have

neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." THE FEDERALIST NO. 78, at 523 (Jacob E. Cooke ed., 1961).

IV. THE FOURTH AMENDMENT'S TEXT AND HISTORY PROVIDE NO BASIS FOR A HIGHER STANDARD OF REASONABLENESS FOR SEARCHES AND SEIZURES RELATED TO LAW-ENFORCEMENT PURPOSES

Neither the text nor the history of the Fourth Amendment supports a higher standard of reasonableness for law-enforcement searches and seizures. The Fourth Amendment was written to apply to all searches and seizures without regard to their purpose. Unlike the Fifth, Sixth, and Eighth Amendments, the Fourth Amendment does not explicitly refer to criminal matters in its text. Akhil Reed Amar, *Fourth Amendment First Principles,* 107 HARV. L. REV. 757, 757 (1994).[4] The absence is indication of the Fourth Amendment's universal applicability.

Besides the constitutional text, the experience of the people living at the time the Bill of Rights was adopted makes clear that such a distinction between

[4] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

"No person shall be held to answer for a capital, or otherwise infamous *crime* . . ." U.S. CONST. amend. V. (emphasis added).

"In all *criminal* prosecutions . . ." U.S. CONST. amend. VI. (emphasis added).

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual *punishments* inflicted." U.S. CONST. amend. VIII. (emphasis added).

law-enforcement and civil regulatory purposes is unwarranted. Searches and seizures for what might be deemed civil regulatory purposes were at the forefront of concern for colonial Americans. For instance, visits by the tax collector were considered no small affair in the late eighteenth century:

> The excise-officers have power to enter your houses at all times, by night or day, and if you refuse them entrance, they can, under pretence of searching for exciseable goods, that the duty has not been paid on, break open your doors, chests, trunks, desks, boxes, and rummage your houses from bottom to top; nay, they often search the cloaths, petticoats and pockets of ladies or gentleman, (particularly when they are coming from on board an East-India ship) and if they find any the least article that you cannot prove the duty to be paid on, seize it and carry it away with them; who are the very scurf and refuse of mankind, who value not their oaths, and will break them for a schilling.

A Farmer and Planter, MARYLAND JOURNAL, April 1, 1788, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 241-42 (Neil H. Cogan ed., 1997).

The colonists apparently feared the use of searches and seizures for the control of political activities as well. Perhaps the most influential case in this regard was *Wilkes v. Wood,* 98 Eng. Rep. 489, 498-99 (C.P. 1763), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 230-31 (Philip B. Kurland & Ralph Lerner eds., 1987). John Wilkes, a member of Parliament, had used the press to criticize the crown and the government. Officials obtained general warrants to search Wilkes'

home and personal papers and to arrest him. Wilkes successfully challenged the warrants in trespass, and he and the jurist who decided the case, Chief Justice Charles Pratt, later Lord Camden, became renowned throughout the colonies. AKHIL REED AMAR, THE BILL OF RIGHTS 65-67 (1998).[5]

The authors of the Bill of Rights also believed that the Fourth Amendment would aid in the preservation of other civil liberties, such as the freedoms of speech and press. Similar in legal prominence to *Wilkes v. Wood* was *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 233-35 (Philip B. Kurland & Ralph Lerner eds., 1987). In that case Lord Camden disapproved of the use of searches and seizures of papers, "often the dearest property a man can have," to exercise prior restraints on speech:

> If a man is punishable for having a libel in his private custody, as many cases say he is, half the kingdom would be guilty in the case of a favourable libel, if libels may be searched for and seized by whomsoever and wheresoever the Secretary of State thinks fit.

Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765), *reprinted in id.* at 235.

[5] Symbols of Wilkes and Lord Camden's popularity still exist. Wilkes-Barre, Pennsylvania, as well as counties in North Carolina and Georgia, are named for Wilkes. Lord Camden is still honored by the cities named for him in New Jersey, South Carolina, and Maine, as well as Camden Street in Baltimore, Maryland, from which the Baltimore Orioles' ballpark derives its name. AKHIL REED AMAR, THE BILL OF RIGHTS 66-67 (1998).

The link between other civil liberties and searches and seizures was not lost on the colonists:

> As yet you have the right to freedom of speech, and of publishing your sentiments. How long those rights will appertain to you, you yourselves are called upon to say, whether your houses shall continue to be your castles; whether your papers, your persons, and your property, are to be held sacred and free from general warrants, you are now to determine.

Centinel, No. 1, INDEPENDENT GAZETTEER (Philadelphia), October 5, 1787, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 238-39 (Neil H. Cogan ed., 1997).

This is not to suggest that searches and seizures for more mundane law-enforcement purposes were viewed unsuspiciously by the colonists. The abuse of general warrants to search for stolen goods was also viewed as a problem. *See, e.g., Reply to Wilson's Speech: "A Democratic Federalist,"* PENNSYLVANIA HERALD (Philadelphia), October 17, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION 73-74 (Bernard Bailyn ed., 1993) (expressing worry about the conduct of an investigator entering a home at night with a warrant to search for stolen goods). Nor did Lord Camden view searches and seizures in aid of criminal law enforcement as a trivial issue:

> The justice and the informer must proceed with great caution; there must be an oath that the party has had his goods stolen, and his strong reason to believe they are concealed in such a place; but if the goods are not found there,

> he is a trespasser; the officer in that case is a witness.

Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 234 (Philip B. Kurland & Ralph Lerner eds., 1987).

Rather, even a cursory reading of the relevant history reveals that colonial Americans did not consider searches and seizures concerned "primarily with catching crooks," Pet. App. 8a, to be a special category deserving greater scrutiny than searches and seizures in pursuit of civil regulatory aims. It is only in modern times that the rights of potential criminal defendants under the Fourth Amendment have outgrown those of persons subject to searches and seizures for other purposes. Such a distinction is textually and historically groundless.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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